No. 88-1400

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA;
LEONARD WILSON, individually and as District Manager,
Chicago Office of the Franchise Tax Board
of the State of California;
and B.M. RARANG, individually and as Auditor,
Chicago Office of the Franchise Tax Board
of the State of California,
Petitioners,

vs.

ALCAN ALUMINIUM LIMITED and IMPERIAL
CHEMICAL INDUSTRIES, PLC,
Respondents.

**On Writ of Certiorari To The United States
Court Of Appeals For The Seventh Circuit**

BRIEF OF THE COMMITTEE OF LONDON AND SCOTTISH BANKERS, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Committee of London and Scottish Bankers is the association of the United Kingdom clearing banks.[1] The Committee includes over seventy percent (70%) of the United Kingdom's banking industry. Its members operate throughout the world, directly or through subsidiaries. As a representative of the international banking community of the United Kingdom, the Committee is particularly concerned about the free flow of international trade and commerce and the removal of barriers thereto. The Committee considers a tax system inconsistent with the internationally adopted standard of arm's length/separate entity accounting,[2] such as California's, to constitute such a barrier. Most of the members of the Committee have operated or presently operate in California[3] and are familiar with the California system of worldwide unitary taxation.[4] The consents of the parties to the filing of this amicus brief pursuant to Rule 36 of the Rules of this Court have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

As presented by petitioners, these cases juxtapose issues of standing on the one hand and the Tax Injunction Act[5] and comity

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[1] The members of this committee are Bank of Scotland, Barclays Bank PLC, Lloyds Bank PLC, Midland Bank PLC, National Westminster Bank PLC, Standard Chartered PLC, The Royal Bank of Scotland PLC and Trustee Savings Bank PLC.

[2] This Court has recognized this method as internationally accepted. *See, Container Corp. v. Franchise Tax Board,* 463 U.S. 159, 187 (1983).

[3] Many of the members have protested or are protesting the application of such taxing system on their California operations, and one of the members is presently litigating the constitutionality of the tax in the California court system.

[4] The California system of worldwide combined reporting and formulary apportionment, commonly known as the California unitary tax or the unitary tax is technically not a tax. Amicus will refer to this method throughout this brief as a "taxing system" or the "unitary system."

[5] 28 U.S.C. § 1341.

on the other and bring into conflict policies underlying each. Lurking beneath these procedural issues are the "merits," that is the constitutionality of the California unitary system when applied to foreign owned and controlled multinational corporate groups.

Because these cases come before this Court on such procedural issues, presumably this Court will not reach the merits, i.e., decide that such application of such taxing system is constitutional or unconstitutional.[6] However, for the Court to dismiss these cases as petitioners urge will frustrate some or all of the policies underlying these important procedural doctrines and may inadvertently affect the underlying merits in other cases which do not have the alleged procedural difficulties herein. Amicus believes that the better decision by this Court is to remand these cases to the District Court to permit the respondents to prove their allegations. However, if this Court determines that overriding policy concerns require that the state court have first opportunity to determine the validity of California's taxing system, this Court should remand with instructions to hold these cases until respondents' subsidiaries have the opportunity to present their claims in their refund cases. At that time the District Court can determine if the interests of the respondents have been fully and properly protected and presented in the so called "alternative remedy" which petitioners are urging.

If this Court determines to dismiss these cases based either on the Tax Injunction Act or standing principles, amicus urges the Court to render its decision on as narrow a ground as possible, leaving open opportunities to prove in a proper forum, with a proper record and proper pleadings, the effect and burden of the

[6] Respondent Alcan Aluminium Limited (Alcan) argues that these cases are fully stipulated and this Court is in a position to decide their merits. This is not so. The stipulations of fact are not facts agreed to. The Court will note from the Joint Appendix that there are often assertions of fact to which one or the other of the parties does not agree. A factual determination should be made on these. This Court is not a trial court and should not be placed in a position of deciding what are essentially issues of fact yet unresolved.

California system on both taxpayers and non-taxpayers alike. Not to do so would frustrate the very object which both petitioners and respondents ultimately seek, that is, a full and fair adjudication of the merits on a fully briefed record in a proper forum.[7]

Amicus believes that the issue of "standing" as framed by the petitioners is a misleading one: respondents have alleged direct injury, causation and a protected interest which should be sufficient to meet standing requirements. The more difficult issue is whether the policy concerns animating the Tax Injunction Act override the right of a litigant without a state forum to present its federal question in a federal court. Amicus believes not.

The Tax Injunction Act is a Congressionally designed solution to balance concerns of states with protection of their revenues against the right of a litigant to have its federal claims fully and fairly heard by a court. The balance struck was to bar from the federal district courts litigants seeking to enjoin, restrain or otherwise interfere with the collection or assessment of a state tax unless the state did not provide the litigant with a state court remedy. The parties agree that the respondents, which are not California taxpayers, have no access to the California courts in this matter. Thus, respondents avoid the threshold bar to federal jurisdiction.

Petitioners, however, argue that refund suits by the respondents' subsidiaries are a sufficient state court remedy since respondents' control over, and interests similar to, their subsidiaries should insure that the subsidiaries present the respondents' cases. Both the history of the Act and its language show that the remedy

[7] There is presently pending in the California Court of Appeal after having been tried in the California Superior Court *Barclays Bank International Ltd. v. Franchise Tax Board*, California Court of Appeal, 3rd District, Case No. 3 Civ. C003388 (consolidated with Case No. 3 Civ. C003389). This case, involving both a foreign intermediate parent and its domestic subsidiary, presents the issues reserved by *Container Corp. v. Franchise Tax Board*, e.g., the constitutionality of combined apportionment with respect to state taxation of a domestic corporation with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries. 463 U.S. at 189, n.26; 195, n.32.

should be in the litigant which has the cause. Commonality of interest should not be sufficient to bar a litigant which suffers its own injury. Moreover, petitioners' solution is based on assumptions that the subsidiary can litigate the parent's separate injuries, not only effectively but fully. Those assumptions are speculative. A speculative remedy is not a plain, speedy and efficient remedy within the meaning of the Act. Further, the scope and effectiveness of such an alternate representation are questions of fact which, in fairness, should be determined by the trier of fact prior to any dismissal.

The policy concerns animating the Tax Injunction Act are not subverted by permitting respondents to make their own cases. The State of California is in a unique position to avoid a conflict between such policies underlying the Act and the rights of litigants by giving such litigants access to its courts to present their claims of injury. In the absence of such access, the State should not be heard to complain.

The policy of comity does not bar respondents. Comity, like the policy driving the Tax Injunction Act, is predicated on the assumption that the respondents have access to the state courts—which respondents do not. Moreover, petitioners' (and amici's) contention that anything other than dismissal will bring a flood of litigation into the federal courts is unfounded. The basic contention of the foreign parents, the unconstitutionality of the California system in application to foreign owned unitary groups, is clearly limited to the unique California system which reaches beyond national boundaries and creates the international difficulties. The principle is not one common to interstate tax problems or to the usual taxing system of most of the states.

The California tax system is not a mere accounting methodology, but an aberrant tax system incompatible with the internationally accepted and uniformly employed separate entity/arm's length tax system. The California system, in operation and effect, cannot function without directly involving and implicating non-taxpayers, including foreign parents and their non-United States affiliates. Because California's tax system intrudes into the internationally accepted system for division of income of multinational entities among nations, this intrusion shifts policy considerations

from those of "our federalism" which concern balances between states and the national government to those of "our nation" in its dealings with other nations. It is not appropriate therefore to deny standing on the basis of comity; in fact to do so would violate principles of international comity.

Amicus believes that the standing "issue" as argued by petitioners is a false one. Standing requirements are traditionally satisfied if the litigant alleges a personal injury, caused by the defendant's unlawful conduct, that can be redressed by the remedy sought. There is no question that respondents have met these requirements.

Respondents have alleged that the petitioners' application of its unconstitutional taxing system to compute the tax of the respondents' subsidiaries causes direct injuries to the respondents, including burdensome compliance costs and actual or increased risk of double taxation. These injuries are injuries of the respondents, not of their subsidiaries. The relief sought would redress these.

Petitioners err when they claim that all respondents' injuries are merely derivative of those to their subsidiaries. Respondent Imperial is subject to loss of potential dividend income from its California subsidiary because the United Kingdom denies a credit for the California taxes to the extent these fall on non-California source income as measured under the accepted international standard. It is Imperial which must pay this double tax on its dividend income.

Both respondents face increased risk of or actual double taxation because of their California investments. The California taxing system relies on a worldwide base and may include in such base values which have been already taxed elsewhere in accordance with internationally accepted standards, a result which respondents' domestic competitors do not face when they invest abroad. This harms the respondents' competitive positions.

The California system cannot function without worldwide information—information which is the respondents', not their subsidiaries'. The costs of compiling such information to permit their subsidiaries to comply with California's tax system are initially those of the respondents, not their subsidiaries. Only respondents

have access to the information. Respondents would not have to compile it but for the California system. Petitioners' argument that it is respondents' choice to compile this information, which they could not be forced to produce, is unreasonable. The alternative is having the subsidiary pay a penalty or an unfair tax. Respondents "volunteer" no more than a victim of extortion "volunteers" to make a payment. The argument that respondents could avoid the injury by passing the costs on to their subsidiaries does not affect the existence of direct injury for standing purposes: costs incurred as the result of an improper tax still raise overall costs and create their own disadvantageous effect on respondents' business.

Respondents have an alternate ground for standing. Respondents, as foreign parents operating in international commerce, are squarely within the zone protected by the Foreign Commerce Clause, which ensures the rights of entities to engage in foreign commerce free from unconstitutional burdens. Petitioners' taxing system, in application, injures respondents' own foreign commerce. Such an injury is sufficient to create standing.

Under the guise of concern that the proper party bring the suit, petitioners are seeking to narrow the scope of the suit, to eliminate any issue of injury to foreign parents. The Seventh Circuit found that the respondents' alleged injuries amount to constitutionally cognizable claims. It is the claims of parties not proof of those claims which forms the basis for standing. Respondents have made the necessary claims through their complaints and stipulations. The inquiry should end there.

ARGUMENT

I

INTRODUCTION

The basic issue in these cases is whether the lower federal courts have jurisdiction to entertain the respondents' challenge to the California taxing system. The respondents, Alcan Aluminium Limited (Alcan), a Canadian corporation not doing business in the United States, and Imperial Chemical Industries Limited

(Imperial), a United Kingdom company not doing business in the United States, have alleged that the application of the California worldwide unitary tax system to compute the tax of the respondents' subsidiaries results in an unconstitutional burden upon respondents' foreign commerce. Petitioner, the Franchise Tax Board of the State of California,[8] contends that injury to respondents' foreign commerce is not a cognizable injury sufficiently independent of any injury directly caused by the tax on respondents' California subsidiaries so as to confer standing on either respondent in the federal courts. Even if respondents' alleged injury is sufficiently independent, petitioners claim that the lower federal courts are barred from entertaining the action under the principles of either the Tax Injunction Act or those of comity.

Amicus feels that the standing arguments which petitioners raise are more technical and accordingly will first address the issues of the Tax Injunction Act and comity which involve policy concerns.

II

DISMISSAL OF RESPONDENTS' SUITS WILL NOT PRESERVE THE CONGRESSIONALLY DETERMINED BALANCE BETWEEN MINIMIZING CHALLENGES TO STATE TAXES IN THE LOWER FEDERAL COURTS AND PRESERVING A LITIGANT'S FEDERAL CAUSE.

The Tax Injunction Act represents a Congressionally struck balance between interference with a state's taxing authority and finances and preservation of the rights of litigants who have a valid federal cause of action. To bar such litigants from the federal courts, the Act asks very little of the states and something that is entirely within their control—a state court remedy.[9]

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[8] The other petitioners are Leonard Wilson, individually and as District Manager, Chicago Office of the Franchise Tax Board of the State of California; and B.M. Rarang, individually and as Auditor, Chicago Office of the Franchise Tax Board of the State of California.

[9] Access to the state court need not even be easy. This Court has approved procedures where the litigant must pay taxes to sue with no

Nevertheless, petitioners would give even less. Under the guise of the policy animating the first part of the Tax Injunction Act and other horrors as yet dimly perceived,[10] petitioners now seek to have this Court bar a litigant which does not have a plain, speedy and efficient remedy at law or in equity in the courts of the state. If the litigant otherwise meets the jurisdictional requirements of the federal courts and if California will not let that litigant into its courts, the Court should not add yet another requirement to jurisdiction which Congress did not. Petitioners' sought after expansion destroys the balance between the concerns of the state and the litigants.

A. The History of the Tax Injunction Act Demonstrates That Congress Intended to Preserve a Litigant's Day in Court.

The Tax Injunction Act was enacted in 1937 to prevent litigants who could qualify under the diversity jurisdiction of the federal courts from pursuing injunctive relief against state taxes so long as the litigants had a state court remedy. Congress recognized that the withholding of large sums of money from a state while the litigation proceeded could seriously disrupt state and county finances. Congress also recognized the basic unfairness to a citizen who had to pay his tax in order to raise federal grounds while the federal courts presented to others an alternative forum with injunctive relief. Accordingly, the legislation had two parts. Concern over disruption to state finances and unfairness in availability of forums was addressed by denying jurisdiction to the federal district court to enjoin, suspend or restrain the assessment, levy or collection of a tax under state law, unless the state gave no remedy in its courts. However, a litigant who did not otherwise

interest if victorious, *Rosewell v. La Salle National Bank*, 450 U.S. 503 (1981); cross state lines to litigate in a presumably unfriendly forum, *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976); exhaust remedies, *Rosewell v. La Salle National Bank*, 450 U.S. at 507-508; and comply with other procedural obstacles, *see generally*, 17 Wright and Moore, *Federal Practice and Procedure*, § 4237 at p. 659.

[10] Both petitioners and amici predict wholesale avoidance of the Tax Injunction Act. Amicus disagrees.

have a state remedy would not be prevented from pursuing his federal remedy:

> It should be emphasized that the bill did not take away any equitable right of the taxpayer or *deprive him of his day in court*. Specific provision was made that the suit will not be withdrawn from the jurisdiction of the federal district court *except* where there is a plain, speedy and efficient remedy at law or in equity in the courts of the state. (Emphasis added.)

Senate Judiciary Committee, 75th Congress, First Session, 2 (1937).

Thus, it was clear that the Tax Injunction Act was intended to bar from the federal courts only those litigants who had a choice of both state and federal forums to challenge a state tax, not to deprive a litigant of his only day in court.

B. The State of California Does Not Provide Respondents with a Plain, Speedy and Efficient Remedy in Its Courts.

Petitioners do not dispute that respondents have no right to sue in the California courts to challenge the application of worldwide combined reporting.[11] Petitioners, however, contend that respondents have an "alternative state remedy" in refund suits by their subsidiaries. The petitioners urge this Court to adopt a rule that for the first time would use commonality of interest to bar a litigant which has a cognizable and independent injury.[12]

In urging its alternative state remedy, petitioners assume, without basis, that the subsidiaries are in a position to bring the *same* constitutional claims as the parent and that the proof of such claims is identical. Although the parents and the subsidiaries may both allege constitutional violations based upon the California taxing system's interference with the United States' ability to conduct its foreign policy, the nature of the violations created by

[11] Petitioners' Opening Brief, p. 21.

[12] The question of the jurisdictional bar cannot arise unless the respondents have such an injury.

the application of this taxing system is different for each.[13] The same act may give rise to interference with constitutional rights in different persons.[14] The petitioners cite no authority[15] that this common grievance restricts the right of either aggrieved party (assuming that each party meets the grounds for federal jurisdiction) to pursue its own litigation.

Not only have the Court of Appeal for the Seventh Circuit in its opinion below in these cases and its earlier decision in *Alcan Aluminium Ltd. v. Department of Revenue*, 724 F.2d 1294 (7th Cir. 1984) and the Court of Appeal for the Ninth Circuit in *Capitol Industries-EMI, Inc., v. Bennett*, 681 F.2d 1107 (9th Cir. 1982), *cert. denied*, 459 U.S. 1087 (1982), rejected this argument, but the Court of Appeal for the Ninth Circuit has also rejected a similar contention in *General Motors Corp. v. California State Board of Equalization*, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1122 (1988). In that case appellees, which were fiduciaries of certain employee welfare benefit plans, were obligated under their contract with Metropolitan Life Insurance Company to reimburse Metropolitan for gross premium taxes. The State Board of Equalization applied the gross premiums tax not only to the premiums which the appellees paid Metropolitan, but also to the benefits appellees paid the employees under their plan. The Court of Appeal rejected the contention that Metropolitan's ability to challenge the tax constituted a plain, speedy and efficient remedy for the appellees:

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[13] *See* part III.

[14] The situation is not unlike that of a mother who sees her minor child hit by a negligent driver. The same act causes harm to her in a way different than the harm to the child. No one would contend that the mother has no right to litigate her own claim.

[15] Because there is none. In fact authority is to the contrary.

> It is true that Metropolitan's interests are substantially similar to that of the appellees. *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107 (9th Cir.) (EMI 1), *cert. den.* 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982), squarely holds, however, that a party without state administrative or judicial remedies can maintain a federal action even if a taxpayer with substantially the same interest has state remedies. *Id.* at 1119. The Tax Injunction Act is no bar to appellees' suit.

815 F.2d at 1308.

C. Whether a Subsidiary Could Effectively Raise All Arguments and Protect All Rights of Its Parent Is Unclear. An Unclear Remedy Is Not a Sufficient Remedy Under the Tax Injunction Act.

In urging their "alternative state remedy," petitioners allege, without evidence, that respondents' subsidiaries are in a position to bring the *same* constitutional claims as their parents and that proof of the claims of both is indentical. This Court, in its interpretation of the Tax Injunction Act, has always required that the state remedy be plain. An uncertain remedy or a speculative remedy is not sufficient. *Hillsborough Township v. Cromwell*, 326 U.S. 620 (1946); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101 (1944); *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299 (1952). In *Hillsborough, supra*, the New Jersey courts required a taxpayer who had been singled out for discriminatory taxation to proceed against other members of her class to have their taxes increased rather than reduce the taxpayer's assessment. In that case, although there was a state procedure in place, the Court held:

> On the basis of that rule it is plain that the state remedy is not adequate to protect respondent's rights under the federal Constitution.

326 U.S. at 624.

An argument that New Jersey might provide some remedy through a discretionary writ which was non-reviewable created "such uncertainty surrounding the adequacy of the state remedy

as to justify the District Court in retaining jurisdiction of the cause." 326 U.S. at 626.

In *Spector Motor, supra,* in a solution which this Court may wish to consider, the Court remanded the case to the district court with directions to hold the case, rather than dismissing it, until the Connecticut courts had an opportunity to resolve other basic state issues.[16]

In the *Redwine* case, *supra,* this Court rejected a suggestion that use of the federal claim *as a defense* in a suit brought by the appellee to recover taxes was hardly a remedy that could be invoked by the appellant.[17]

In the most recent case before this Court construing the phrase, "plain, speedy and efficient remedy," *Rosewell v. LaSalle National Bank, supra,* this Court explored the legislative history and plain language of § 1341, as well as the policy concerns. There was never an issue about the existence of the remedy, only whether the state court remedy met certain minimal *procedural* criteria.[18]

The Court also discussed the "plain meaning" of the terms:

> A *procedural* interpretation of the phrase "a plain, speedy and efficient remedy," and the *procedural* sufficiency of Illinois' remedy, are supported further by analysis of the phrase's individual words. According to the 1934 edition

[16] The matter was subsequently decided in *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602 (1950), *overruled on other grounds sub nom. Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977).

[17] *Georgia Railroad & Banking Co. v. Redwine,* 342 U.S. at 303, fn. 11.

[18] The statute required the taxpayer to pay the tax and sue for refund. The state would not pay interest on any refunded amounts. The Court felt that the issue was whether or not the taxpayer had a *mechanism* in place to assert her rights; the mechanism would be the same whether or not interest was paid. Throughout the opinion the emphasis was on full hearing and a judicial determination. Justice Stevens, writing for the dissent, felt that a plain, speedy and efficient remedy also required certain substantive protections.

> Webster's New International Dictionary, *plain* means "clear" or "manifest," *speedy* means "quick," *efficient* means "characterized by effective activity," and a *remedy* is "the legal means to recover a right . . . or obtain redress for . . . a wrong." Webster's New International Dictionary of the English Language, 819, 1878, 2106, 2418 (2d ed. 1934) (Footnote omitted.)
>
> While the Court has never addressed the meaning of the word "speedy," it has interpreted the words "plain" and "efficient." Thus, the Court suggested that "uncertainty concerning a state's remedy may make it less than 'plain' under 28 USC § 1341." *Tully v. Griffin, Inc.,* 429 U.S. at 76.
>
> Earlier cases, without making a direct connection to the word "plain," have held that "uncertainty" surrounding a state-court remedy lifts the bar to federal-court jurisdiction. *Hillsborough v. Cromwell,* 326 U.S., at 625-626. (Footnote omitted.)

450 U.S. at 516-517.

In other words, if the Act requires only procedural safeguards, the litigant must have, at minimum, a clear procedure to invoke.[19]

South Carolina v. Regan, 465 U.S. 367 (1984), cited by petitioners, would seem to sustain respondents' position, not petitioners'. South Carolina sought this Court's original jurisdiction to review the constitutionality of § 103(j)(1) of the Internal Revenue Code, requiring certain state obligations to be issued in registered rather than in bearer form to qualify for the interest exemption. The Secretary of Treasury resisted the filing on the ground that the action was barred by the Anti-Injunction Act[20] which, with certain exceptions not relevant here, barred all suits for purpose of restraining the assessment or collection of any tax "by any person, *whether or not such person is the person against*

[19] *See also, Georgia Railroad & Banking Co. v. Redwine,* 342 U.S. 299 (1952).

[20] 26 U.S.C. § 7421(a).

whom such tax was assessed." (Emphasis added.)[21] Since South Carolina was not the taxpayer, the normal administrative and judicial challenges to the tax provided by the federal law would not be available. The Court held that the state had the standing to bring such suit: in spite of the apparent limitation, the circumstances of enactment strongly suggested that Congress intended the Act to bar a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax.[22]

Not only does the Tax Injunction Act not contain the third party prohibition of the Anti-Injunction Act, it clearly permits suit when the state courts do not provide a forum.

Petitioners' "solution," the creation of an "alternative remedy" in the hands of third parties, is no solution at all. Whether the scope of a subsidiary's litigation is the same as the scope of the parent's is a question of fact which requires a comparison of the nature of the two cases.[23] In fairness, if this Court were to accept

[21] The italicized portion had been added by a 1966 amendment.

[22] Footnote 19 on which petitioners heavily rely was a response to the concerns expressed in Justice O'Connor's dissent that taxpayers would form organizations which as non-taxpayers could avoid the bar of the Anti-Injunction Act. Petitioners have not contended that the foreign parents in these cases were formed for avoidance purposes. In fact, it is the independent business activity of the parent and its non-taxpayer affiliates which creates the problem: if the parent and these affiliates were not operating profitable businesses, the income of which is included in the tax base, no one would care. Moreover, petitioner Franchise Tax Board has often opposed the inclusion of non-profitable affiliates. This Court and other courts have ample means, such as the sham transaction doctrine, to prevent avoidance. However, blanket rules barring litigants which have independent rights but no procedures to assert them directly would raise the difficult issues of due process alluded to by this Court in *South Carolina v. Regan*,. *See*, 465 U.S. at 375-376, 393-395. *See also* part III, C (on litigants within the zone of protected interests).

[23] E.g., is the same evidence admissible? Do claims of non-parties face any exhaustion of remedies requirement? Would there be relevancy exceptions to evidence offered in support of the non-taxpayer claims?

petitioners' approach, this Court[24] should review both the cases here and the alternative refund suits to be sure that all rights are preserved. Even this, of course, would be a deviation from earlier precedent. When there is a question of the extent of the remedy, this Court has either permitted the federal litigation to proceed on the basis that the remedy was speculative[25] or remanded the case to the district court to hold until the state aspects of the litigation were completed.[26] The Court has not dismissed the litigation as the petitioners seek.

Under the plain meaning of the Tax Injunction Act, the respondents' remedies in the state court do not exist. The protection of the respondents by their subsidiaries is speculative. The respondents do not have a plain, speedy and efficient remedy.

D. The Policy Underlying the Tax Injunction Act Does Not Bar Respondents' Actions.

Petitioners' basis for the expansion of the bar seems to be twofold: the strong policy of the Tax Injunction Act against interference with state tax systems and the collection of state taxes, and the alleged, but not explained, contention that such expansion is necessary to prevent "wholesale avoidance of the Tax Injunction Act."

No one seriously disputes that the purpose of the Tax Injunction Act, as this Court has said, is to "limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle National Bank, supra*, 450 U.S. at 522. But Congress also "limited the limitation" by requiring that the state provide a plain, speedy and efficient remedy in its courts.[27]

[24] Or the District Court on remand.

[25] *Hillsborough Township v. Cromwell*, 326 U.S. 620 (1946).

[26] *See, Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. at 105-106.

[27] If the sole purpose of the Act was to prevent *any* such litigation in the federal courts short of review by this Court, Congress would have ended 28 U.S.C. § 1341 with the words "state taxes."

The courts below have pointed out that the state holds within its own hands the answer to its perceived problem: give the litigant a forum. Petitioners' response to this is only that it would be "disruptive." Petitioners do not explain why. Why would the pressing of its suit by the litigant which has a direct injury be more disruptive to the state, particularly if the constitutional claims are, as the state contends, the same? Contrary to petitioners' urging, would this not promote more efficiency in such litigation?[28] At the same time it would insure that all rights and all parties' concerns could be heard in one forum.

Petitioners also contend that, unless this Court expands the bar of the Tax Injunction Act in the cases herein, states will be faced with a multiplicity of suits in the federal courts in direct derogation of the Act's purposes.[29] Again, the states possess a ready solution: give the litigant its day in their courts.

However, even without such a solution, the states have not indicated how, as a practical matter, the special circumstances of

[28] A particularly apposite example is *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). In that case, six exchanges were able to join taxpayer members in state court in challenging the constitutionality of a state tax which, by its imposition, diverted business from the exchanges, non-taxpayers. This Court held that the exchanges had rights within the "zone of interests" protected by the Commerce Clause. *See also*, part III, C hereof.

[29] Contentions that the same arguments could be applied in challenges to interstate commerce are baseless. Respondents allege two injuries, double tax and compliance burdens, which are direct to them. In interstate commerce, the burden of double taxation is probably foreclosed. *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978). Nor are these special compliance burdens likely to be raised in the context of interstate commerce. Any information necessary to determine tax within the United States is already collected for federal tax purposes, so, unlike the additional burden of collecting new information from outside the United States in derogation of the international standards, there are no compliance burdens for foreign parents in addition to those which domestic parents face.

this litigation[30] would permit non-taxpayers to circumvent the limitations of the Tax Injunction Act. First, the courts already have the tools to avoid attempts to evade the strictures of this Act —through sham transaction or similar analysis—where subsidiaries or other corporations are formed solely for the purpose of bringing suit. Second, it is difficult to see how a litigant can raise the type of injury at question here, or any other type of injury, except in the very peculiar circumstances of the California worldwide combined reporting system. Although many states employ the unitary principle, few states have ever employed worldwide combined reporting,[31] and of the few, California is almost alone in pursuing the system to the extent and with the vigor California employs. The system is unique and the problems which it creates are unique.

E. The Principles of Comity Have No Application When the State Provides No Remedy.

Petitioners also urge that the principle of comity should apply even if the Tax Injunction Act does not. Petitioners rely on *Fair Assessment In Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981). Again, this case does not really stand for the proposition which petitioners advance. In *Fair Assessment*, the taxpayers had a plain, adequate and complete state remedy. As this Court said:

[30] *See* part III, B hereof.

[31] Of the states that have used some kind of unitary principle, only five (Alaska, California, Idaho, North Dakota and Oregon) routinely used true worldwide combination prior to 1983. Rusch and Kennedy, *State Revenues That Would Be Lost By Prohibiting Worldwide Unitary Taxation*, Tax Notes, p. 1035, 1036-1037 (December 19, 1983). Five others (Colorado, Massachsetts, Montana, New Hampshire and Utah) included foreign subsidiaries of U.S. parents, but excluded foreign parents and foreign subsidiaries of foreign parents. *Id.* Currently, all states except Alaska have adopted some form of water's edge legislation limiting worldwide combined reporting. BNA Daily Tax Reports, p. G-2, June 9, 1989 (describing a June 7, 1989 statement of Senator William Roth on the introduction of federal legislation on state unitary taxation).

> Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete[8] and may ultimately seek reviews of the state decisions in this Court. (Citations omitted.)
>
> The adequacy of available Missouri remedies is not at issue in these cases. The District Court expressly found "that [petitioners] have means to rectify what they consider an unjust situation through the state's own processes," . . . and petitioners do not contest this finding. In addition, the Missouri Supreme Court has expressly held that plaintiffs such as petitioners may assert a Section 1983 claim in state court. (Citations omitted.)

454 U.S. at 116.

The Court in footnote 8 referred to in the text above, also pointed out that there was no significant difference for purposes of the principles recognized in these cases between remedies which are: "plain, adequate and complete," as the phrase was used in articulating the doctrine of equitable restraint and those which are plain, speedy and efficient within the meaning of the Tax Injunction Act. The Court specifically referred to the numerous federal decisions treating the adequacy of the state remedies and stated: "[I]t is to that body of law that federal courts should look in seeking to determine the occasions for the comity spoken of today." *Id.*

These cases do not lend themselves to the application of principles of comity.

F. International Comity Creates a Countervailing Policy to Permit the Respondents to Pursue Their Federal Cause.

The California system, worldwide combined reporting of a so called unitary business, cannot function without directly involving and implicating non-taxpayers.[32] The burdens which this system

[32] Amici, Idaho, et al., contend that the nature of California's tax is irrelevant to the questions presented by this Court. On the contrary, the nature of the California method of dividing the taxable income of multinational business is most relevant to the issues before this Court.

creates in seeking to determine California's share of taxable income fall not solely on the taxpayer as taxes paid, as the petitioners would have this Court believe, but also upon the other non-taxpayer members of unitary business, particularly upon the parent, as double taxation and compliance costs incurred solely to permit the parent and related companies to respond to the demands of the California system.[33] California's system reaches out well beyond California—or United States—boundaries to affect economic decisions by the parent on a continuing basis and—where the parent is a foreign parent as are respondents—places such parent at a competitive disadvantage when it invests in California.

The states understandably are quick to rise to a defense of any perceived intrusion into their taxing systems. But the states here are not quick to recognize a counter intrusion which an inconsistent taxing system such as California's makes into the internationally accepted system of dividing income for tax purposes. It is this intrusion which shifts the policy considerations from those of "our federalism," which concerns balance between our states and our national government, to those of "our nation" and its dealings with other nations.[34] It is no secret—and the record in these cases affirms it—that the California tax system has become an international "cause celebre."[35]

The Court of Appeal below recognized this when it referred to "international comity."

Thus, there is a countervailing policy reason not to extend the principles of comity in those circumstances where the issues do not solely involve the relationships between the nation and the states. The concerns of "our nation" must always be supreme.

[33] *See* part III hereof.

[34] California is one of the largest "nations" in the world in terms of its economy—generally ranked in the top seven world economies—so that it has ample resources to pursue its system. Its intrusion is neither minimal nor indirect.

[35] *See, e.g.,* Joint Appendix, 34 and Exhibits 17-1 to 17-4.

III

IN THE GUISE OF STANDING, PETITIONERS ATTEMPT TO PROCURE A PREMATURE RULING ON THE MERITS OF THE CALIFORNIA TAX AS APPLIED TO FOREIGN OWNED AND CONTROLLED UNITARY GROUPS.

Respondents fit within the four corners of the traditionally recognized requirements for standing. Respondents allege in their complaints (supported by the partially agreed stipulation of facts) an injury personal to them, caused by petitioners' application of worldwide combined reporting to their California subsidiaries. Those allegations are sufficient to confer standing in the federal courts.

Further, respondents fit within the "zone of protected interest" cases which also provide a basis for standing. The Court of Appeal below recognized that the application of an allegedly unconstitutional tax adversely affects respondents' economic interests, an injury sufficient to provide independent standing.

Petitioners' attempts to define away respondents' injury as derivative or non-cognizable are nothing more than attempts to get a premature ruling on the merits. Traditional standing analysis does not reach the merits. The standing issue appears before this Court only because the petitioners refuse to recognize the possibility of merit in respondents' claims and do not wish to provide the respondents with a forum in which to air their grievances.

A. Respondents Have Made Sufficient Allegations of Injury and Causation for Purposes of Standing.

Traditional standing rules require no more than that a litigant allege such a personal stake in the outcome of a controversy before the court so as to warrant the litigant's own invocation of federal court jurisdiction and justify the exercise of the court's remedial powers on its behalf. *Warth v. Seldin*, 422 U.S. 490 (1975); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). The injury alleged by the litigant must be fairly traceable to the

defendant's unlawful conduct and be capable of the redress sought by the litigant. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Respondents satisfy these requirements. Respondents have identified injuries suffered by them directly as foreign parents as the consequence of the alleged unconstitutional application by petitioners of worldwide combined reporting to respondents' California subsidiaries. Respondents allege that the application of worldwide combined reporting by petitioners to compute the tax of their United States subsidiaries is unconstitutional as a violation of the Foreign Commerce Clause.[36] Respondents allege that the California taxing system requires them, as well as their subsidiaries, at substantial cost to them, not to their subsidiaries, to compile information which, to the extent it exists, is their information, not the subsidiaries. The respondents would not have to compile this information *but for* the California tax system. Respondents also allege that they, not their subsidiaries, suffer actual or increased risk of double taxation. This alleged injury is different from, and independent of, any increase in taxes to their California subsidiaries. The Court of Appeal recognized from the respondents' allegations and the stipulations that the California taxing system, in application, impacts adversely upon respondents' economic choices, in derogation of their protected rights under the Foreign Commerce Clause. It is those injuries of which respondents complain and those injuries for which they seek redress. The relief sought by respondents will stop the alleged unconstitutional application of the tax to foreign parent unitary groups.

B. Respondents' Injuries Are Direct Injuries, Not Those of Their Subsidiaries.

Petitioners first contend that there is no constitutionally cognizable injury in the parents, only derivative injury of the subsidiary. Petitioners virtually ignore Imperial's claim of double tax by denial of credit. Petitioners recharacterize respondents' general claims of double taxation as claims of wrongful inclusion of the income of the foreign parent in the apportionable income base of

[36] Article I, Section 8, clause 3.

the unitary group. They then argue that any compliance burden asserted by respondents is really that of the subsidiaries. Finally, they argue that the tax is the only cognizable burden—and that tax is on the subsidiary. Even if each injury exists and is cognizable—which petitioners deny—since the injuries are really those of the subsidiaries, the alleged harm reduces the subsidiaries' value: such diminution, argue petitioners, is not a direct injury to the parents, and is insufficient to provide standing under prudential standards.

Petitioners hope, by defining the injuries away, to eliminate the party in the best, and perhaps only,[37] position to claim them. The basic problem with petitioners' approach is that it is not for a defendant to define the injuries of the litigant.

1. Imperial's Additional Double Tax Injury Is a Direct Injury.

Although both respondents allege general claims of double taxation,[38] Imperial also contends that risk of double taxation arises from denial of credit against taxes which it must pay in the United Kingdom on dividends from its California subsidiary. The United Kingdom will deny such credit for California taxes on the subsidiary's income if the United Kingdom determines, using the international standard, that such California taxes are measured by income not having a source in California.[39] This is an injury to Imperial since it reduces its net dividends. The cause of the injury

[37] *See*, subpart E hereafter.

[38] Both respondents allege double taxation of their income caused by the California tax. It is unclear and presumably would await consideration of the underlying evidence whether the double tax complained of is actual double taxation or is simply increased risk of double taxation. Either, as this Court stated in *Japan Line Ltd. v. Los Angeles County*, 441 U.S. 434 (1979), may create constitutionally cognizable competitive disadvantage.

[39] Joint Appendix 19, 57, Ex. 19. The California tax system, of course, is different than and incompatible with the internationally accepted standard of arm's length/separate entity accounting and its attendant rules for the division of income among nations.

is the failure of California to abide by the international standard in determining its tax base. This type of injury clearly does not fall on the subsidiary, but directly on the parent.[40]

2. Both Respondents Allege General Double Tax Injury, an Injury Directly That of the Parents.

Understandably, petitioners characterize respondents' general double taxation claims narrowly, in an attempt to fit these within the confines of this Court's opinion last term in *Shell Oil Co. v. Iowa Department of Revenue*, ___ U.S. ___, 109 S.Ct. 278 (1989). *Shell* held that inclusion in the apportionable income base of income claimed to be foreign sourced was constitutional under the four part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). It did not address the issue of whether double taxation of the income of a foreign unitary group was unconstitutional under the additional two tests applicable when foreign commerce is implicated. *Japan Line Ltd. v. Los Angeles County*, 441 U.S. 434 (1979); *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983).

Here, the question is not whether extraterritorial taxation occurs because of inclusion of certain income within the tax base, but whether double taxation of the international income of the foreign unitary group headed by respondents (i.e., taxing the same values twice) is a constitutionally cognizable claim if proven within the limits of *Japan Line, Limited v. Los Angeles, supra* and *Container Corp. v. Franchise Tax Board, supra*. Since the facts surrounding such claims are not yet proven, a decision that this injury is not cognizable is premature.[41]

[40] It would also seem to fall clearly within the type of direct injury described by petitioners in their opening brief. See discussion at p. 24 in which actions involving dividends are cited as examples of the exception to the stockholder standing rule.

[41] In addition, even if such "double taxation" does not fall under the first of the two additional *Japan Line* tests, it may still affect the second test.

3. Both Respondents Allege Compliance Burdens Falling Directly on Them in Violation of the Foreign Commerce Clause.

This Court has long accepted the principle that, in examining the constitutionality of a tax, it is not only the incidence of the tax that must be examined, but also the tax in its practical operation and effect. *See, e.g., New Energy Co. of Indiana v. Limbach,* 486 U.S. 269 (1988); *American Trucking Assn., Inc. v. Scheiner,* 483 U.S. 266 (1987); *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984); *Halliburton Oil Well Cementing Co. v. Riley,* 373 U.S. 64 (1963).

Under California law, to compute its tax, a California taxpayer must determine the *worldwide* income of the unitary business and the *worldwide* factors.[42] Respondents have alleged that they have suffered injury because *they* incur cost and expense in compiling information necessary to compute the tax. The information required by the California tax system, to the extent it exists, clearly must come from the foreign parents and their non- United States affiliates. Respondents contend that the California tax system cannot operate, and more importantly operate fairly, without the gathering of this information.[43]

The only reason for such compilation of information by the foreign parent is to meet the requirements of the California tax system. Petitioners contend that these are only the obligations of the taxpayer, that no demands are made on either of the respondents and

> clearly both have been at liberty to decline any requests for information which may have been directed to them by their subsidiaries.
>
> * * *

[42] Joint Appendix, 46-47.

[43] The information is not ordinarily compiled or kept by the taxpayer subsidiaries or even available to them in the normal course of business. For that matter, much of the information would not be compiled by the parent in the normal course. Joint Appendix, 78.

> [It is the] respondents' argument that, unless their subsidiaries are to be at the mercy of the California taxing authorities, the parents must establish elaborate systems of accounting to determine the correct California tax liability. What Alcan and Imperial actually are complaining about is the expense of gathering information which *they* deem essential to a fairer calculation of the taxes assessed against their subsidiaries. This again would be an assumed burden undertaken to preserve the value of their stock holdings, not a burden imposed upon them by the taxing authorities.[44]

Petitioners' response reveals the California taxing system as the classic "Catch 22." The system cannot operate without the information. The information is in the hands of respondents. Respondents have the "choice" of incurring cost or seeing their subsidiaries penalized. Therefore, conclude petitioners, there is no burden on respondents. The decision whether to incur the compliance burdens or forego production of information and let the subsidiary suffer an unfair tax or penalties is that of the parent. Either way, the business incurs additional cost (which, of course, makes the business less competitive). A system which creates this type of anti-competitive choice is a clear violation of the Commerce Clause. *See, e.g., Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977).

Even if the costs are passed on to respondents' subsidiaries, the costs are initially those of the respondents and constitute direct injury for standing. Petitioners' argument here is similar to that already rejected by this Court in *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984).

In that case, Hawaii argued that liquor wholesalers who brought an action in federal court seeking to recover taxes paid under protest pursuant to the Hawaii Liquor Tax Law had no

[44] Petitioners' Opening Brief, p. 39. In the footnote to this text in their brief, the petitioners state that much of the information utilized is already available in published form. However, that information is not in the form of California tax information and, as the stipulations show, it is necessary to convert such information and collect other information, at considerable expense, to respond properly. Joint Appendix, 58, 78.

standing to challenge the tax because they could pass on the tax and thus sustain no injury. After first noting that the wholesalers had to return the tax to the state whether or not the customers paid, this Court stated that, *even if* the tax was completely and successfully passed on, the tax increased the price of the wholesalers' products as compared to the exempted beverages and discriminated against the wholesalers' business. Thus, the wholesalers were surely entitled to litigate "whether the discriminatory tax had an adverse competitive impact on their business" and clearly had standing in the Court to challenge the tax. *Id.* at 468 U.S. 267.

Even if the burdens of worldwide combined reporting are passed on to the respondents' subsidiaries, the respondents must still incur these first, and the increased cost creates a competitive disadvantage to a foreign unitary group which must suffer the offshore effects of the California tax. Like the Hawaiian liquor wholesalers, respondents are entitled to their day in court to prove the discriminatory effect and the anti-competitive impact of the California tax on their business.

C. Respondents Are Within the Zone of Interests Protected Under the Foreign Commerce Clause. They Have Alleged Sufficient Injury to Their Competitive Interests by Virtue of the Petitioners' Application of Worldwide Combined Reporting to Their Subsidiaries. Such Injury Is Cognizable for Purposes of Standing.

This Court recognizes standing where a litigant asserts an independent injury, economic or otherwise, as a result of an unconstitutional act to a party with whom the litigant has a business or professional relationship. *See, e.g., Pierce v. Society of Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510 (1925); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970). This Court also recognizes standing in representatives or associations on their own behalf, separate and apart from that of their members, where the representative or association asserts injury to itself. *See., e.g., Hunt v. Washington State Apple Advertising Commission, supra* [standing in Washington Apple

Advertising Commission *in its own right* to assert unconstitutionality of a regulatory measure affecting Washington apple growers (its members) where the Commission alleged that its attempt to remedy injury to its members was central to its purpose of protecting and enhancing the Washington marketplace for its growers]; *see also, Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977).

These cases recognize that constitutional guarantees often protect a "zone of interests." If a party fits within those zones of protectable interests and alleges an injury to its own interests caused by constitutional violations affecting another, standing exists.

In *Boston Stock Exchange v. State Tax Commission, supra,* this Court held that six regional stock exchanges had standing to challenge a discriminatory tax because they were in the zone of interests protected under the Commerce Clause. The stock exchanges, located outside of New York, had filed an action in state court against the State Tax Commission of New York and its members, alleging that the transfer tax asserted by New York unconstitutionally discriminated against interstate commerce by imposing a greater tax burden on security transactions involving out-of-state sales than on transactions of the same magnitude involving in-state sales. The State raised the question of the standing of the exchanges to raise the issue. The Court dismissed the argument stating:

> Appellants' complaint alleged that a substantial portion of the transactions on their exchanges involved securities that are subject to the New York transfer tax, and that the higher tax on the out-of-state sales of such securities diverted their business from their facilities to exchanges in New York. This diversion was the express purpose of the challenged statute. The allegation establishes that the statute has caused them "injury in fact" and that a case or controversy exists. The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free from discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are "arguably within the zone of interests to be protected . . . by

the . . . constitutional guarantee in question." (Citations omitted.)

429 U.S. at 320-21, n.3.[45]

Respondents are clearly within the zone of interest protected by the Foreign Commerce Clause: the alleged injury to their economic interests arises from the application of the California taxing system in violation of the Foreign Commerce Clause. They clearly have standing.

D. Petitioners' Narrow Definition of Injury Attempts to Reach the Merits[46]

Standing does not depend on the ultimate adjudication of the merits of the litigants' contention, but rather on the nature and sources of the claims asserted. *Warth v. Seldin*, 422 U.S. at 500.

The California system, using worldwide information, cannot exist without implicating worldwide operations. The "implications" result in real out-of-pocket costs. It is these "offshore implications" which create the injuries as well as make California's tax system unconstitutional.

Petitioners, understandably, would prefer to litigate these cases on narrow grounds. Under the guise of concern over the "party bringing the issue" (standing), they seek to define what it is that the party can litigate. By invoking the policies of the Tax Injunction Act, petitioners have sought to bar from all courts the very parties in the best position to bring before the courts these difficult issues.[47] As this Court has said in *Association of Data*

[45] It is interesting to note that in the *Boston Stock Exchange* case, unlike these cases, the exchanges were able to pursue their remedies in state court. Here, petitioners afford respondents no similar opportunity.

[46] Petitioners ask the Court not to decide the merits. Yet, they spend most of the time arguing the presence and incidence of injuries (i.e., the merits), not the sufficiency of the allegations.

[47] For example, if Imperial cannot bring before the court its double tax issue (credit, etc.) because petitioners contend it is not Imperial's injury but the subsidiaries', is there any assurance that the subsidiaries could raise it in a trial court? Will not petitioners contend that it is not

Processing Service Organizations, Inc. v. Camp, supra, in reversing the Court of Appeal which had looked to the legal interest of the appellant in denying standing:

> The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

397 U.S. at 153.

Because the California taxing system, in practice and effect, clearly affects more than the taxpayer subsidiaries and because the ultimate issue will be the California taxing system's constitutional or unconstitutional burden on foreign commerce, if there is any doubt that all issues and arguments can be placed before the court in a refund suit by a domestic subsidiary this Court should err on the side of allowing the suits herein.[48]

the subsidiaries' injury and exclude the proposed evidence on relevancy or other evidentiary grounds? *See also* part II hereof.

[48] Or, alternatively, deciding the issues on narrow grounds so as not to indirectly influence or impact the cases currently pending in the state courts.

CONCLUSION

The California unitary system operates on the theory that California is only "measuring" its tax by the worldwide income of the unitary group. The merits of this position are not before this Court at this time.

Respondents, on the other hand, have alleged that injury from the operation of the system extends beyond their California subsidiaries and that the unconstitutional application of the California system directly injures them. The sufficiency, but not the merits, of these allegations is before this Court.

It is clear that respondents do not have access to the California courts to hear their claims. What is also clear is that the Tax Injunction Act does not, and the underlying principles of that Act or comity should not, prohibit respondents from raising those claims in a federal forum.

Respondents have sufficiently alleged their federal claims. They should be allowed their day in court.

Respectfully submitted,

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